

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,)
a Michigan Corporation,)

Plaintiff,)

vs.)

Case No. 2:09-CV-10756

NAVIGATION CATALYST SYSTEMS,) Volume I

INC., a Delaware corporation;)

BASIC FUSION, INC., a Delaware)

corporation; CONNEXUS CORP., a)

Delaware corporation; and)

FIRSTLOOK, INC., a Delaware)

corporation,)

Defendants.)

DEPOSITION OF DAVID GRAFF

New York, New York

Friday, June 24, 2011

Reported by: Danielle Grant

NDS Job No.: 143388

1 claim? And when I say "resolve," I don't mean
2 pay it, because, as I understand it, the
3 payment to resolve the plan was made after the
4 combination of the companies closed in May of
5 2010.

6 Was it resolved by agreement
7 prior to the -- to the consummation of the
8 merger agreement?

9 A No. It was -- the case was
10 settled on or around May 12th of 2010. I may
11 be off by a couple of days.

12 Q And the closing date on the
13 merger transaction was when?

14 A May 4th.

15 Q During the due diligence
16 process, when you were in communication with
17 Art Shaw and Chris Perrone and discussing
18 whatever aspects of the process you were
19 discussing, did the Weather Underground lawsuit
20 come up in the discussion?

21 A Yes.

22 Q Did you learn whether or not
23 during the due diligence period whether
24 Connexus had established a loss reserve for
25 that case? Not asking you what it was, I'm

1 just asking whether -- whether it was done.

2 A I don't recall ever being
3 informed by anyone at Connexus that a loss
4 reserve had been put on their books in any
5 amount associated with this case.

6 Q What was the other lawsuit
7 besides the Weather Underground lawsuit that
8 was pending on the Connexus side during due
9 diligence, was there one?

10 A There -- there was a lawsuit
11 filed by a plaintiff called Beyond Systems.
12 Beyond Systems is a small Internet service
13 provider located in Maryland.

14 Q Is that a collection matter?

15 A No. Beyond Systems has a
16 history, along with an associated company
17 called Hypertouch of filing what I'm going to
18 call CAN-SPAM suits. They filed dozens over
19 the past couple of years. And Beyond Systems
20 filed a lawsuit against Kraft and several other
21 companies including -- it's either Connexus or
22 Traffic Marketplace, I'd honestly have to look
23 at the caption to tell you -- alleging
24 violations of the California and Maryland state
25 statute's equivalence of the federal CAN-SPAM

1 occurred some six months or so after the
2 merger. And you're nodding your head yes, but
3 I'm just providing you the background for my
4 question. And we know that Art -- or we
5 learned that Art was the CEO of Connexus at the
6 time of the merger, and on the board and
7 possibly the CEO of some of the Connexus
8 companies underneath it at the time of the
9 merger.

10 And my question is: After the
11 merger, what was the corporate structure of
12 Connexus? Did Art Shaw remain the CEO of
13 Connexus or not?

14 A So, after the acquisition,
15 the -- Connexus became -- this is a little bit
16 roundabout, I'm just trying to think of the
17 right way to answer the question.

18 Q Sure.

19 A After the acquisition, Connexus
20 became a wholly owned subsidiary of Epic
21 Advertising. Art Shaw was the CEO, Don Mathis
22 was the president of the company. With respect
23 to all of the other corporate subsidiaries,
24 they did not -- the -- the directors of those
25 subsidiaries were essentially myself and

1 Mr. Mathis. That's what we would do as sort of
2 part of our corporate structure. Art was the
3 CEO of the -- sort of the entire enterprise.

4 Q So, for instance, let's just
5 take Connexus as an -- as an entity. Did it
6 have a CEO after -- after the merger and
7 acquisition?

8 A It was essentially Art Shaw who
9 sort of did double-duty as the CEO of the
10 combined -- of the Epic Media Group or Epic
11 Advertising and also of Connexus. Seth Jacobi
12 was the president of First Look. Don Mathis
13 was the president of -- sort of the U.S./Epic
14 Marketplace. I'm sorry, I'm just relaying --
15 reviewing the corporate structure visually in
16 my head.

17 Q Were there CEOs for any of the
18 other Connexus side companies after the merger?

19
20 A Are you referring to Traffic
21 Marketplace and --

22 Q Sure. First Look, Net Blue
23 Vietnam, Navigation Catalyst?

24 A So, for -- so, for First Look,
25 Seth Jacobi was the president of the company.

1 Connexus or Navigation Catalyst or Traffic
2 Marketplace, and see who the boards of
3 directors, for instance, are for those
4 different companies?

5 A Yes.

6 Q Okay.

7 A I believe. And I think these
8 have already been produced. In connection with
9 the acquisition, there was a series of board
10 resolutions, minutes, et cetera, that will show
11 you for each entity the -- the board of
12 directors, right? It's essentially just
13 Mr. Mathis and myself for all of the various
14 subsidiaries.

15 Q With Mr. Mathis being the
16 president of all those companies and you being
17 the secretary, for instance, I'm just -- I'm
18 guessing.

19 A I'd have to look at it. We were
20 certainly the directors. I would have to look
21 at the document to recall if that -- if it's
22 specified officers as well.

23 Q For the Connexus side entities
24 post merger, you've indicated that the two
25 corporate officers are either Mr. Mathis or

1 yourself. You indicated that insofar as
2 Navigation Catalyst is concerned, you believe
3 that there may not be corporate officers for
4 that entity?

5 A If you look at the document I
6 was just referring to, post acquisition, those
7 corporate officers would probably be myself and
8 Mr. Mathis. I would have to look at the
9 document. Prior to the acquisition, I really
10 can't -- I really don't know. I don't know who
11 was designated.

12 Q Are there corporate record books
13 for the Connexus side entities that would have,
14 for instance, minutes of board meetings post
15 merger?

16 A There are -- let me think for a
17 moment.

18 No, I don't believe so.

19 Q And I guess the question was
20 whether or not there were any record books.
21 Have there been any board meetings of the
22 Connexus side entities post merger?

23 A I don't believe so.

24 Q Post merger, have you attended
25 any board meetings other than an Epic Media

1 Group, Inc. board meeting?

2 A I have not.

3 Q To your knowledge, post merger,
4 have there been any other board of directors
5 meetings for any entity under the Epic Media
6 Group umbrella presently, other than the Epic
7 Media Group board meetings?

8 A To my knowledge, no.

9 Q Is it your position that the
10 Epic Media Group, Inc. controls all of its
11 subsidiaries through its own governance
12 structure and -- and board of directors?

13 MR. DELGADO: Objection; vague
14 and ambiguous, calls for a legal
15 conclusion.

16 A Well, Epic Media Group is the
17 parent company, right? I mean, these are all
18 wholly owned subsidiaries. So, whatever
19 control a parent company can exercise over a
20 wholly owned subsidiary, that's the type of
21 control that Epic can exercise over its
22 subsidiaries.

23 Q I'm going to show you what's
24 marked as labeled Deposition Exhibit 293 from
25 the Art Shaw deposition, and it's entitled

1 sense that cash used -- well, let me back up
2 for a second.

3 I don't know the originating
4 bank, but these two expenses, I think it's fair
5 to say, were paid with cash that sort of
6 Connexus brought to the table for lack of a
7 better word.

8 Q Were you involved in the
9 discussion concerning whether to use Connexus
10 cash to pay these liabilities or was that
11 simply an accounting side issue?

12 A You know, I don't recall
13 specific discussions about, you know, should we
14 use Connexus cash to pay for these expenses.
15 This is post acquisition, so we were operating
16 as -- at least, conceptually, right, a combined
17 enterprise. I don't know if there were
18 separate discussions at the accounting level or
19 among the financial team.

20 Q Okay. On the next page, which
21 is Page 20, there is a Connexus legacy balance
22 sheet where it indicates at the top under
23 current assets, cash. That on March 10th,
24 there was \$6.8 million cash available. And
25 then post merger on June 10th, there was only

1 Q So, as a general statement,
2 then, if the Connexus/First Look side of the
3 business owned domains as assets at the time of
4 the merger, other than simply releasing some
5 that maybe were not of any value, there have
6 been no transfer of those domains?

7 A That's correct.

8 Q Have there been any DBAs filed
9 since the merger took place on the Connexus
10 side, where either Connexus or Traffic
11 Marketplace or First Look -- or any of those
12 entities under that umbrella -- are now doing
13 business under the Epic name, Epic Media Group?

14 A No.

15 Q Epic Media Group owns the stock
16 in Connexus Corporation, correct?

17 A That's correct.

18 Q It's a single share of stock at
19 this point or -- or is it something different?

20 A It's a single share of stock if
21 I recall correctly. I recall that the -- yes,
22 that's correct.

23 Q Tell me, from your understanding
24 or viewpoint, how the merger transaction took
25 place relative to the transfer of stock,

1 estate companies, for example, do this all the
2 time to segregate their assets.

3 Q And, as a result, the Connexus
4 shareholders were able to exchange their stock
5 for Epic stock under the ratios pursuant to the
6 agreement?

7 A That is correct.

8 Q I didn't bring the document, but
9 there was a change in the valuation on the Epic
10 side for the trade of stock, I think in April
11 as I recall. The merger agreement had a set of
12 values for the valuation of stock, and then I
13 think after that there was a document that we
14 looked at, at Art Shaw's deposition, that
15 changed the value significantly downward on the
16 Epic side.

17 Are you familiar with that at
18 all?

19 A I think I know what you are
20 referring to. I believe you are referring to
21 the amendment to the merger agreement -- or an
22 amendment to the merger agreement, which, if I
23 recall correctly, changed the value of the --
24 of the preferred shares.

25 Yeah, I do recall the